

WONG WIEW HOCK**a**

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, SIBU

TEE AH SING J

b

[CRIMINAL APPEAL NO: 20-41-24 OF 1996]

5 MAY 1997

CRIMINAL LAW: *Assisting in carrying on public lottery - Section 4A(a) Common Gaming Houses Act 1953 - Whether conviction proper - Whether exhibits tendered pertained to illegal 4-Digit lottery - Expert evidence - Whether inadequate - Expert report - Whether wrongly admitted*

c

CRIMINAL PROCEDURE: *Conviction - Assisting in carrying on public lottery - Section 4A(a) Common Gaming Houses Act 1953 - Whether conviction proper - Whether exhibits tendered pertained to illegal 4-Digit lottery - Failure of trial Magistrate to form independent opinion thereon - Whether fatal - Failure to tender search list - Adverse inference*

d

EVIDENCE: *Expert evidence - Admissibility - Assisting in carrying on public lottery - Section 4A(a) Common Gaming Houses Act 1953 - Expert report not served on accused - Whether report inadmissible - Expert called as witness - Whether could affect admissibility - Common Gaming Houses Act 1953, ss. 11(3), 11(5) - Criminal Procedure Code, s. 399*

e

EVIDENCE: *Conflicting testimony - Assisting in carrying on public lottery - Section 4A(a) Common Gaming Houses Act 1953 - Conflicting evidence as to place of discovery of exhibits - Failure to tender search list - Effect - Whether if produced would have been unfavourable to prosecution*

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This was an appeal against the decision of the learned Magistrate, SibU, for convicting the appellant of an offence under s. 4A(a) Common Gaming Houses Act 1953 ('the Act') and sentencing him to one day imprisonment and a fine of RM 20,000 in default six months imprisonment. The appellant, apparently, was the owner of the coffee shop in which the incriminating exhibits were found. In the Court below, evidence was adduced by the prosecution that the said exhibits were recovered from the counter and counter drawer respectively of the shop. This piece of evidence, however, was challenged by the appellant who contended that the exhibits were in fact taken from and found on a table. No search list was tendered by the prosecution, but the learned Magistrate, nonetheless, made a finding of fact that a search list had been served on the appellant and was therefore inclined to accept the prosecution's version of the story.

g**h****i**

- a* In convicting the appellant, the learned Magistrate had also relied on the oral evidence of the gaming expert ('PW3'), as well as the report ('P8') which PW3 had prepared and tendered in Court. P8, however, was never served on the appellant. This apart, PW3 has also not explained, either in his oral testimony or through P8, as to why he had concluded that the exhibits pertained to illegal
- b* 4-Digit lottery. The appellant appealed and argued that the conviction was flawed as (i) P8 was inadmissible and was wrongly admitted into evidence (ii) the learned Magistrate had not sufficiently directed her mind to P8, and in any case had failed to make an independent conclusion of her own as to whether the exhibits tendered pertained to illegal 4-Digit lottery (iii) adverse
- c* inference ought to be invoked against the prosecution for not tendering the search list in Court to reflect where the exhibits were seized.

Held:

- d* [1] The learned Magistrate erred in law in admitting the expert report P8 into evidence. P8 clearly was inadmissible.
- e* [2] To render P8 admissible the prosecution must satisfy the Court that the provisions of s. 11(5) of Act have been complied with, i.e. that a copy of the report has been served upon the appellant within the time stipulated. There was no evidence here that a copy of P8 had been
- f* served on the appellant not less than 14 clear days before the commencement of the trial. There is also no acknowledgement by the appellant that he has been served with such copy.
- f* [3] Although PW3 was called as a witness, he could not render his report admissible merely by producing it at the trial. If his report was in the first place inadmissible because of failure to serve it within the stipulated term, it could not be made admissible by his presence in Court.
- g* [4] On the facts, there was an acute conflict of evidence on a material point, namely, where the exhibits were found. This being the case, a search list ought to be tendered by the prosecution. Since the search list was not produced the only inference to be drawn is that if it had been produced it would have been unfavourable to the prosecution.
- h* [5] The gaming expert PW3 had not given his reasons for his opinion in respect of the exhibits. His allegation that E1 pertained to illegal 4-Digit lottery was only a bare assertion. As for E2, he has also not explained what he meant by "code of permutation bets". There is no explanation in respect of E2 and E3 as to how the total of the amount staked in respect of each lottery ticket was calculated. PW3 has also not testified what date was written on E6 to E10. He has also not testified what
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was the date for the draw of legal 4-Digit (lottery). Further, he has not explained what he meant by legal 4-Digit or how E6 to E10 was connected to legal 4-Digit.

[5a] Although PW3 stated that E1 to E3 were undated because it was a trend for illegal 4D agent not to write the date on the records of stakes to confuse the authority, he has not given any reasons for saying so.

[5b] It follows that in the circumstances, and in coming to the decision she did, the learned Magistrate did not appear to have appreciated that it was her duty to study the exhibits herself with the assistance of a sufficiently detailed explanation from the expert before she could satisfy herself that the exhibits did in fact relate to records of stakes pertaining to a public lottery, namely illegal 4-Digit lottery.

[6] PW3's evidence as a gaming expert was wanting and was inadequate to enable the learned Magistrate to form her own independent opinion whether the exhibits were related to public lottery or not. Hence, at the close of the prosecution case, the appellant ought to have been acquitted and discharged without his defence being called.

[Appeal allowed. Order accordingly]

Cases referred to:

Alcontara a/l Ambross Anthony v. Public Prosecutor [1996] 1 CLJ 705 (*refd*)

Public Prosecutor v. Sulaiman bin Mohamad Noor [1996] 1 MLJ 196 (*refd*)

Public Prosecutor v. Kong Tshoi Kiew [1996] 2 CLJ 1052 (*refd*)

Public Prosecutor v. Lee Eng Kooi [1996] 2 MLJ 322 (*refd*)

Lam Peng Hoa & Anor. v. Public Prosecutor [1996] 3 CLJ 747 (*refd*)

Goh Beng Seng v. Dol bin Dolah [1970] 2 MLJ 95 (*refd*)

Liew Chin Yoong v. Public Prosecutor [1971] 1 MLJ 127 (*folld*)

Legislation referred to:

Common Gaming Houses Act 1953, ss. 4A(a), 11(3), (5)

Criminal Procedure Code, s. 399

For the appellant - Wong Sing Nang; M/s. Wong, Orlando Chua & Co.

For the respondent - Awang Armadajaya Awang Mahmud, Deputy Public Prosecutor

JUDGMENT

Tee Ah Sing J:

Wong Wiew Hock ('the appellant') was on 26 February 1996 convicted of an offence under s. 4A(a) of the Common Gaming Houses Act 1959 ('the Act') and was sentenced to one day imprisonment and a fine of RM20,000 in default six months imprisonment.

a The charge against the appellant was as follows:

That you, on 17 May 1993 at about 2.20 p.m, at Delta Cafe, No. 10 Lane 6, Delta Road Sibu in the State of Sarawak, did assist in carrying on a Public Lottery, to wit illegal 4 Digits lottery, and that you thereby committed an offence punishable under s. 4A(a) of the Common Gaming Houses Act 1953 (Act 289).

b It is to be noted that throughout the trial in the Magistrates' Court at Sibu the appellant was undefended by Counsel.

This is an appeal against the conviction and sentence.

c In respect of grounds one and two of the petition of appeal, the learned Counsel for the appellant submitted that the search list is crucial in this case as to where the exhibits were seized. Without tendering the search list there is a reasonable doubt as to whether all the exhibits were seized from the counter or also on the table. In support the case of *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705 was cited.

d In respect of ground three the learned Counsel for the appellant submitted that as between E2 and E3 in p. 65 of the Appeal Record and para. 2 of p. 18 of the Appeal Record, there is a great difference of the expert opinion. The second paragraph of p. 18 of the Appeal Record reads: "In this E2 there is code circle around the figures. This code of permutation bets." These two sentences are not in the expert report. Further, the first paragraph of p. 19 of the Appeal Record states "E6 to E10 are the accounts and in my opinion it is an accounts related to illegal 4-Digit" is also not the same as on p. 65 of the Appeal Record in respect of E6 to E10 which contain these words

e "Magnum Corporation Bhd. dan Sports Toto Malaysia Bhd." And furthermore, the words "Nama-nama pelanggan dicatat pada bahagian atas kertas-kertas yang terdapat dalam buku-buku kecil itu" are not in the oral testimony of PW3.

f In the 3rd paragraph of p. 19 of the Appeal Record which is in respect of E11 and E12 is different from the expert report in that there were two words missing. And at p. 65 of the Appeal Record that is E11 and E12 the words "yang memenangi hadiah" are missing and also "dianjur oleh Magnum Corporation Bhd. dan Sports Toto Malaysia Bhd."

g In p. 17 of the Appeal Record PW3 stated the date as 22 May 1993 whereas in p. 22 of the Appeal Record PW4 stated the date of handing over the exhibits to PW3 was on 29 July 1993, so it was submitted that there was a break in the chain of evidence.

h It was further submitted that PW3 cannot add, vary or supplement his expert report (P8). In support the case of *Public Prosecutor v. Sulaiman bin*

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Mohamad Noor [1996] 1 MLJ 196 was cited. Since PW3 has varied and supplemented his own report, this vitiates the expert report. **a**

In respect of grounds four and six it was submitted that there were other people in the shop. As there was no search list to reflect where the exhibits were seized benefit of doubt should be given to the appellant. **b**

In respect of ground five it was submitted that the learned Magistrate did not expressly state that she had accepted and admitted the expert evidence. And the learned Magistrate also failed to direct her mind on the expert evidence then assess it and come to a conclusion. In support the case of *Public Prosecutor v. Kong Tshoi Kiew* [1996] 2 CLJ 1052 was cited. **c**

It was lastly submitted that by reason of the discrepancies in the expert report and the oral testimony of PW3, there are two sets of evidence hence unreliable and ought to be rejected. On this point the case of *Public Prosecutor v. Lee Eng Kooi* [1996] 2 MLJ 322 was cited. **d**

The learned Deputy Public Prosecutor ('DPP') submitted that the case of *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705 refers to a drug case. He urged the Court to distinguish it as in the drugs case extra caution must be exercised as a conviction entails the capital punishment. He agreed that the failure in a drugs case to tender a search list will entail adverse inference. **e**

From the evidence of PW1 it is clear that Exhs. P1 to P4 were found on the counter while the forecast number booklets (P5 and P6) were found in the counter drawer. PW2 has also stated that Exhs. P1 to P4 were found on the counter while Exhs. P5 and P6 were found in the drawer of the counter. **f**

There was no cross-examination of PW1 and PW2.

The DPP then submitted that there was no discrepancy nor contradiction of the evidence of PW3 and his expert report. What PW3 has testified in Court is to elaborate and explain as required in the case of *Public Prosecutor v. Kong Tshoi Kiew (supra)*. **g**

As regards the names of customers which was not mentioned in the oral testimony but was mentioned in the expert report at p. 65 of the Appeal Record, it was submitted that this was not crucial as the report itself was tendered as an exhibit. On the issue of Magnum Corporation and Sports Toto which was not mentioned in the oral testimony at p. 19 of the Appeal Record but instead the term legal 4D draw was used. So it was submitted that the legal 4D lottery would include Magnum and Sports Toto and in no way will amount to a contradiction. **h**
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a It was also submitted that the confirmation of Exh. P8 by PW4 clearly shows that his evidence at p. 22 on the date the exhibit was referred to PW3 on 29 July 1993 was due to a human error.

b It was submitted that the case of *Public Prosecutor v. Sulaiman bin Mohamad Noor* [1996] 1 MLJ 196 deals with the chemist report in respect of a drugs case where the drug could change physically over time unlike the exhibits in our case.

It was further submitted that the provisions of s. 399 of the Criminal Procedure Code do not bind the procedure in tendering the report.

c It was submitted that DW2 was not in a position to know what happened in the coffee shop. And the evidence of DW2 contradicts that of DW1 and is merely an after thought.

d It was further submitted that the learned Magistrate did not indicate that she required more evidence.

e It was also submitted that in the case of *Public Prosecutor v. Lee Eng Kooi (supra)* the prosecution adduced two sets of evidence which were contradictory in nature. But in our case, it is not the prosecution who adduces contradictory evidence but it is the defence who tried to confuse the Court by providing a different albeit by conflicting one. So it was submitted that the case of *Public Prosecutor v. Lee Eng Kooi (supra)* should be distinguished.

f In reply the learned Counsel for the appellant submitted that once the expert is called as a witness to testify in Court, the expert report is inadmissible as substantive evidence save as corroboration. That is held in the case of *Lam Peng Hoa & Anor. v. Public Prosecutor* [1996] 3 CLJ 747. Therefore the expert report cannot be used to substantiate his evidence in respect of the date of handling exhibits.

g I shall first deal with the issue whether the expert report (P8) is admissible in evidence.

Section 11(3) and 11(5) of the Act reads as follows:

h (3) Where evidence or a certificate is given by a gaming expert that any document produced before the Court is a lottery ticket of any public lottery or is an account, memorandum, riddle or record of stakes or wagers in or relating to any public lottery, the Court shall presume that such a document is a lottery ticket of such public lottery or an account, a memorandum, riddle or record of stakes or wagers in or relating to such public lottery, as the case may be.

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(5) A certificate given under sub-s. (3) shall, where the prosecution intends to give it in evidence, be served upon the accused not less than fourteen clear days before the commencement of the trial and the certificate shall be admissible without the presence of the maker thereof as witness unless so required – **a**

(a) by the Court; or **b**

(b) by the accused, in which case the accused shall give the Public Prosecutor a notice in writing not less than seven clear days before the commencement of the trial.

To render the report admissible in evidence the prosecution must first satisfy the Court that the provisions of s. 11(5) of the Act have been complied with, that is to say, that a copy thereof has been served upon the appellant within the time stipulated, and until the prosecution has done this the report cannot be received in evidence. In the absence of such proof the report is inadmissible. **c**

Chief Inspector Tieu Leong Seng (PW3) has stated in his examination-in-chief that he has prepared his expert report. It was signed by him. **d**

At p. 20 of the Appeal Record when the prosecuting officer wanted to tender the expert report the appellant who was not represented by Counsel objected to it being tendered. And the learned Magistrate overruled the objection and had the expert report marked as Exh. P8. **e**

Sgt. James Bundang (PW4) has testified in his examination-in-chief (at p. 22 of the Appeal Record) that he was the investigation officer of this case. On 29 July 1993 he referred the exhibits to Chief Inspector Tieu Leong Seng (PW3) to form the gambling expert report. On 19 August 1993 he received the gambling expert report. **f**

At p. 23 of the Appeal Record he stated he can't remember whether a copy of the expert report (P8) was handed over to the accused or not. **g**

There was no evidence adduced by the prosecution that a copy of the expert report (P8) has been served on the appellant less than fourteen clear days before the commencement of the trial. There is also no acknowledgement by the appellant that he was served with a copy of the expert report (P8). **h**

Since the provision of s. 11(5) of the Act has not been complied with the expert report (P8) is inadmissible. **i**

In *Goh Beng Seng v. Dol bin Dolah* [1970] 2 MLJ 95. His Lordship Sharma J at p. 97 said:

- a* The mere fact, however, that Counsel for the defendant in this case did not object to the admissibility of the statements of witnesses made to the police, does not excuse me from excluding such evidence if in fact and law it is not admissible. It is the duty of the Court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of Counsel to object to it.
- b* Thus, I am of the view that the learned Magistrate erred in law in admitting the expert report (P8) which was inadmissible.
- Further, even though the learned Counsel for the appellant at the appeal did not submit that the expert report (P8) was inadmissible for failure to comply with s. 11(5) of the Act such failure to object does not render the inadmissible evidence admissible.
- c* Furthermore, in the case of *Liew Chin Yoong v. Public Prosecutor* [1971] 1 MLJ 127 His Lordship Chang Min Tat J (as he then was) at p. 128 said:
- d* However, as far as I could find, the report prepared by the senior chemist was never proved to have been served on the accused in accordance with s. 399 Criminal Procedure Code, so as to render it admissible: see, *inter alia*, *Chong Peng v. Public Prosecutor* [1954] MLJ 39 and *Public Prosecutor v. Ng Fah* [1954] MLJ 156. This failure on the part of the prosecution was perhaps the reason why he was called as a witness. But as a witness, he did not render his report admissible merely by producing a copy of it at the trial. If his report was in the first place inadmissible because of failure to serve it within the stipulated term, it could not be made admissible by the presence of the permitted author of it.
- e*
- f* So relying on the case of *Liew Chin Yoong v. Public Prosecutor (supra)* even though PW3 was called as a witness and he also tendered his own expert report (P8), this does not render the expert report (P8) admissible.
- As an appellate Court this Court must disregard the inadmissible evidence, namely, the expert report (P8).
- g* According to PW1, he found P1, P2, P3 and P4 on the counter and P5 and P6 in the counter drawer.
- According to PW2, he found P1, P2, P3 and P4 on the counter. In the drawer of the counter he found P5 and P6.
- h* The appellant in his defence in cross-examination stated that P1 was found on a table not counter. He also stated that he saw the police found the papers on the table next to the counter but he did not know how many. He stated that the forecast book was not found in the drawer. At p. 33 of the Appeal Record he stated that “when few of the police came to the shop, they go to
- i* the counter but did not found anything.”

At p. 35 of the Appeal Record DW2 stated that the exhibit was seized on the table in the front part of the shop. And on p. 36 of the Appeal Record DW2 also stated the police did not find anything at the counter. *a*

The police found few pieces of paper on the table which was left by the customer. *b*

DW3 has stated that he saw a policeman seizing few pieces of paper from the front table of the shop.

I shall next deal with the issue of the search list.

The learned Magistrate in her grounds of decision at p. 54 of the Appeal Record said "All the above items were seized. Search list was issued by PW2 and a copy was given to the accused." *c*

Here the learned Magistrate had made a finding of fact that a search list was issued by PW2 and a copy was given to the accused. Since it is the defence contention that the exhibits were not found on the counter but on the table whereas PW1 and PW2 stated that P1 to P4 were found on the counter while P5 and P6 were found in the counter drawer there is an acute conflict of evidence on a material point, namely, where were the exhibits found, the search list should have been tendered. However, the search list was not tendered by the prosecution. Since the search list was not produced the only inference to be drawn is that if it had been produced it would have been unfavourable to the prosecution. *d*

In p. 56 of the Appeal Record the learned Magistrate in her grounds of decision said as follows: *f*

From the undisputed evidence above and from the evidence of PW3 the gambling expert that the items seized are pertaining to illegal 4 Digit except E5 and with the finding of the two forecast book inside the counter drawer, my finding of fact is that there was evidence adduced that the accused person, Wong Miew Hock, assisted in the carrying of illegal 4-Digit lottery as preferred in that charge and found in possession of such lottery tickets. *g*

PW3 testified as a gaming expert. At pp. 17 and 18 of the Appeal Record PW3 stated that ID1 was the 4 pieces of paper written with number. It was marked by him as E1 to E4. E1 was recorded with three illegal 4-D lottery ticket with total stakes of RM6.20. It is in the record of stake. No date written on it. The stake of RM1.20 is only available at illegal 4-D lottery. He continued as follows: *h*

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- a* For E2 it is recorded with 13 illegal 4-D lottery tickets with total stake of RM25. It is the record of stake. No date written on it. In this E2 there is code circle around the figures. This code of permutation bets. This code normally used in illegal 4-D lottery.
- b* E3 it is recorded with 10 tickets with total stake of RM15. There is no date written on record of stakes.
- ...
- ID2 are six yellow booklets written with numbers. They are marked as E5 to E10.
- c* At p. 19 of the Appeal Record PW3 testified as follows:
- E6 to E10 are the accounts and in my opinion it is an accounts related to illegal 4-Digit. The opinion was form because the date written on E6 to E10 was the dates for the dates for the draw of legal 4-Digit together with the amount of money.
- d* ...
- ID4 – 2 pieces of red papers written with numbers. The figures written in my opinion is the account related to illegal 4-D because the date written co-inside with the legal 4D draw. The two pieces of paper I marked as E11 and E12.
- e* In re-examination PW3 (at p. 21 of the Appeal Record) said:
- ID1 (E1 to E4) why it is not dated, from my experience and own study, it is a trend for illegal 4-D agent purposely not to write the date on the record of stakes. It was done to confuse the authority concerned.
- f* I shall now deal with the evidence of PW3. He stated that in E1 it was recorded with three illegal 4-D lottery ticket with total stakes of RM6.20. He did not state what were the stakes for each of the three illegal 4-D lottery tickets which come to the total stakes of RM6.20. What is more confusing is he stated that the stake of RM1.20 is only available at illegal 4-D lottery. He did not explain how the total stake of RM6.20 is arrived at based on the stake of RM1.20. I am of the view that he has not given his reasons for this opinion.
- g*
- In respect of E2 he has not explained what he meant by “code of permutation bets.” In respect of E2 and E3 there is no explanation as to how the total of the amounts staked in respect of each lottery ticket was calculated.
- h*
- In respect of E6 to E10 PW3 has not testified what was the date written on E6 to E10. He has also not testified what was the date for the draw of legal 4-Digit. He has not explained what he meant by legal 4-Digit. He has also not explained how E6 to E10 was connected with legal 4-Digit.
- i*

In respect of E11 and E12 he has not stated what was the date in E11 and E12. Neither has he stated the date of the legal 4-Digit draw. He has not explained which legal 4-D draw he was referring to. *a*

In respect of E1 to E3 he has stated that E1 to E3 were not dated because it is a trend for illegal 4-D agent purposely not to write the date on the records of stakes as it was done to confuse the authority concerned. However, PW3 has not given any reasons or explanation for saying so. *b*

Further without the date PW3 has not explained how E1 to E3 was based on which date of the legal 4-Digit draw. He has also not explained what he meant by legal 4-Digit draw. *c*

In this case the learned Magistrate did not appear to have appreciated that it was her duty to study the exhibits herself with the assistance of a sufficiently detailed explanation from the expert (PW3) before she could satisfy herself that the exhibits related to records of stakes pertaining to a public lottery, namely, illegal 4-Digit lottery. *d*

From the testimony of PW3, it is clear that PW3's evidence as a gaming expert was wanting. He has not given any reasons or explanation for his opinion.

As the expert (PW3) had given no reasons for his conclusions, the learned Magistrate was in no position to judge whether the evidence of the expert was in fact acceptable. *e*

I am of the view that the expert evidence was not adequate and she was not able to form her own independent judgment whether Exhs. P1, P2, P3 and P4 were related to a public lottery or not. (See *Public Prosecutor v. Kong Tshoi Kiew* [1996] 2 CLJ 1052). *f*

As such, at the close of prosecution case, the appellant should have been acquitted and discharged without his defence being called.

In view of the foregoing, the appeal is allowed, the conviction and sentence quashed. The fine, if paid, is to be refunded to the appellant. *g*

Reported by WA Sharif

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